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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-718

PAUL D. MCGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden Auburn Prison, Auburn, New York, J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Appellants,

against

JAMES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

Appellees.

BRIEF FOR APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-718

PAUL D. MCGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden Auburn Prison, Auburn, New York, J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Appellants,

against

JAMES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

Appellees.

BRIEF FOR APPELLANTS

Opinions Below

The opinion of the three-judge District Court is reported at 332 F. Supp. 973 and appears in the Appendix at p. 53a. The opinion of the single district judge convening the three-judge court is reported at 327 F. Supp. 1318 and appears in the Appendix at p. 24a together with the Court's decisions in *Phipps* v. *McGinnis,* which were annexed to the opinion.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. §§ 1253 and 2101(a). The order of the District

Court was entered on October 15, 1971 and notice of appeal was filed in that Court on November 12, 1971. Appellants' jurisdictional statement was filed on November 29, 1971. Probable jurisdiction was noted on March 20, 1972.

Questions Presented

1. Whether that portion of New York Correction Law, § 230(3) that allows credit for good behavior to be computed upon the minimum term of an indeterminate sentence less jail time allowance violates the Constitution because it treats prisoners in prisons under the jurisdiction of the State of New York different from defendants in jails awaiting trial and court disposition, such jails being under the jurisdiction of the counties of New York State.

2. Whether the instant case should have been treated as a proceeding for habeas corpus with the corollary requirement that appellees exhaust their state remedies.

Statutes Involved

Section 230 of the New York Correction Law states as follows:

> "§ 230. Definite sentence; indeterminate sentence; discretionary reduction of sentence.
>
> 1. A sentence to imprisonment in a state prison for a definite fixed period of time is a definite sentence. A sentence to imprisonment in a state prison having minimum and maximum limits fixed by the court or the governor is an indeterminate sentence.
>
> 2. Every prisoner confined in a state prison or penitentiary, except a prisoner sentenced for an indeterminate term having a minimum of one day and

a maximum of his natural life, may receive, for good conduct and efficient and willing performance of duties assigned, a reduction of his sentence not to exceed ten days for each month of the minimum term in the case of an indeterminate sentence, or of the term as imposed by the court in the case of a definite sentence. The maximum reduction allowable under this provision shall be four months per year, but nothing herein contained shall be construed to confer any right whatsoever upon any prisoner to demand or require the whole or any part of such reduction.

3. In the case of a definite sentence prisoner, said reduction shall be computed upon the term of the sentence as imposed by the court, less jail time allowance, and in the case of an indeterminate sentence prisoner, said reduction shall be computed upon the minimum term of such sentence, less jail time allowance. No prisoner, however, shall be released under the provisions hereof from a state prison until he shall have served at least one year. In the case of a prisoner confined in a penitentiary, said reduction shall be computed upon the term of the sentence as imposed by the court, including jail time allowance. Subject to the rules of the commissioner of correction, the maximum reduction of ten days in each month, may, in the discretion of the board hereinafter provided for, be in whole or in part withheld, forfeited or cancelled, in accordance with the rules of the commissioner of correction for bad conduct, violation of prison rules or failure to perform properly duties assigned.

4. Every prisoner confined in an institution under the jurisdiction of the state department of correction for an indeterminate term, except a prisoner sentenced for a term having a maximum of natural life, may receive, for good conduct and efficient and

willing performance of duties assigned a reduction of his sentence not to exceed two days for each month of the maximum term. For meritorious progress and achievement in a treatment program to which he has been assigned, following appropriate testing and classification such prisoner may also receive a reduction of his sentence not to exceed three additional days for each month of the maximum term. In no event, however, shall the maximum reduction allowable under this subdivision exceed two months for each year of the maximum sentence, nor shall any such reduction be calculated under this subdivision to reduce the time actually served to a term less than the minimum sentence imposed by the court. The reduction of sentence provided for in this subdivision, or any part thereof, may be granted, withheld, forfeited or restored subject to rules and regulations which the commissioner of correction is hereby authorized to promulgate and enforce, and such rules and regulations may include special provisions for the allowance of such reduction in the case of a prisoner who is an invalid or physically or mentally disabled who requests to be enrolled in a treatment program and performs to the limit of his capacity. But all reduction of sentence provided for in this subdivision which is received by a prisoner prior to any release on parole, including release pursuant to this subdivision, shall be forfeited and shall not be restored if the paroled prisoner is returned to an institution under the jurisdiction of the department either for violation of parole or by reason of a conviction for a crime committed while on parole. A paroled prisoner who is so returned may earn a reduction pursuant to this subdivision after his return, calculated only on the remaining portion of the maximum term of the sentence. Nothing contained herein shall be construed to confer upon any prisoner the

right to demand or require any reduction of maximum sentence. Every prisoner who is released prior to the expiration of his maximum sentence pursuant to this subdivision shall remain under the supervision of the board of parole for the full term of the maximum sentence imposed by the court and the procedure and terms and conditions applicable to such release shall be the same as those provided in this article for the release and parole of a prisoner who is not otherwise subject to the jurisdiction of the parole board.

5. Nothing contained in this section shall be construed to confer upon any prisoner the right to demand or require the restoration of any reduction of sentence heretofore forfeited or withheld by the commissioner of correction. A monthly account showing any reduction of sentence that has been credited to each prisoner pursuant to this section shall be kept by the warden in suitable books or records."

Section 230 is implemented by Sections 234, 235 and 236 of the New York Correction Law, which state as follows:

"§ 234. Rules for allowance of reduction of sentence.—The commissioner of correction shall formulate rules governing the allowance or disallowance of reductions to prisoners for good conduct and for efficient and willing performance of duties assigned to them in prison or penitentiary. All such rules shall in all cases be strictly adhered to in all the prisons and penitentiaries in this state. These rules may be changed from time to time, if necessary, in the discretion of the commissioner of correction, and he shall immediately upon their adoption or upon any changes in the same thereafter, cause copies of the same to be forwarded to the wardens and superintendents of all the state correctional institutions and the wardens or superintendents of all the penitentiaries in this state. A copy

of these rules shall be furnished to every prisoner entitled to the benefits of this article.

§ 235. Determination of reduction of sentence.—For the purpose of applying the rules mentioned in the last section for the allowance or disallowance under the provisions of this article of reduction for the good conduct of any prisoner, and for efficient and willing performance of duties assigned, a board shall be constituted in each of the prisons of this state, to consist of the warden, the principal keeper, the physician and the officer in charge of industries therein and, in each of the penitentiaries of this state, the warden or superintendent, the deputy or principal keeper and the physician therein, or of the persons acting in their place and stead. This board shall meet once in each month before the date fixed for the transmission of their report to the commissioner of correction, as hereinbefore provided, and proceed to determine the amount of reduction of sentence which they shall allow to any prisoner, which shall not in any case exceed the amount fixed by this article. They shall have full discretion to withhold the allowance of reduction of sentence for good conduct and for efficient and willing performance of duties assigned, or of a part therefor, as a punishment for offenses against the discipline of the prison or penitentiary, in accordance with the rules hereinbefore mentioned. Reduction credited to a prisoner in the first instance, in his account, by the warden, as provided in section two hundred and thirty, shall stand as the reduction allowed, unless withheld wholly or partly by the board as punishment as above provided.

§ 236. Report when allowance withheld.—In all cases, however, where the board shall withhold the allowance of the whole or any part of reduction of sentence for

good conduct and for efficient and willing performance of duties assigned, they shall forward with their report to the commissioner of correction their reasons in writing, for such disallowance. The action of the board in granting all withholding reductions shall be deemed a judicial function and shall not be reviewable if done according to law."

Section 213 of the New York Correction Law states as follows:

"§ 213. Reasons for release. Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties assigned in prison, but only if the board of parole is of opinion that there is reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society. If the board of parole shall so determine, such prisoner shall be allowed to go upon parole outside of prison walls and inclosure upon such terms and conditions as the board shall prescribe, but to remain while thus on parole in the legal custody of the warden of the prison from which he is paroled, until the expiration of the maximum term specified in his sentence."

Statement

A.

Appellee Percy Rutherford was convicted of Robbery in the First Degree, Grand Larceny in the Second Degree and Assault in the Second Degree, in the Supreme Court, Nassau County, after trial by jury. On November 1, 1966 he was sentenced to concurrent sentences of 10 to 20 years on the robbery count, 2½ to 5 years on the larceny count, and a suspended sentence on the assault count. When he

was arraigned for these crimes he was held in bail of $5,000, which he never offered to pay. He was received in state prison on November 4, 1966, and was credited with 8 months and 2 days (242 days) jail time on his sentence for the time spent in the Nassau County Jail awaiting trial.

Upon his arrival at state prison, Rutherford received a "minimum parole date" of January 22, 1973 (All of the computations involving Rutherford are set out in the affidvait of Deputy Commissioner John R. Cain, Appendix, p. 18a). This meant that this date was the earliest opportunity that he could meet the Parole Board to determine whether he would be released on parole. Rutherford claimed, in effect, that this date should be set about three months earlier because § 230(3) operates in an unconstitutional manner.

Appellee James Royster was convicted of Burglary in the Third Degree and Grand Larceny in the First Degree in the Supreme Court, Nassau County, after trial by jury. On May 20, 1966, he was sentenced to consecutive sentences of 5 to 10 years on each count. When he was arraigned for these crimes, he was held in bail of $7,500, which he never offered to pay. He was received in state prison on May 26, 1966, and was credited with one year, one month and 9 days (404 days) jail time on his sentence for the time spent in the Nassau County Jail awaiting trial.

Upon his arrival at state prison, Royster received a "minimum parole date" of August 7, 1971 (All of the computations involving Royster are set out in the affidavit of Deputy Commissioner John R. Cain, Appendix, p. 21a). Royster claimed, in effect, that this date should be set about four months earlier.

B.

Appellees instituted an action in the District Court under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) for judgment declaring unconstitutional and enjoining the enforcement of § 230(3) of the New York Correction Law relating to the

awarding of credit for good behavior in state prisons. The action attacked the awarding of credit for good behavior on the minimum term of an indeterminate sentence without giving good time credit on any pre-trial incarceration spent in a county jail awaiting trial and disposition on the charge that resulted in that sentence. Appellees alleged that this differentiation between defendants in county jails and prisoners in state prisons was invidious discrimination between those who could and those who could not post bail prior to trial.

Appellants opposed this application and submitted an affidavit by Deputy Commissioner of Correction John R. Cain stating that the reason good time is not awarded to persons in county jails is because the state must be in a position of supervising and evaluating prisoner behavior in a state program before it awards such good time (Appendix, pp. 19a, 22a). By decision dated January 21, 1971, the District Court granted plaintiffs' application for the convening of a three-judge court.

On March 3, 1971, a three-judge court was convened, and by decision filed on August 23, 1971, the court held, 2-1, that § 230(3) was unconstitutional and permanently enjoined the enforcement of said provision. The majority held that there was no rational basis for the distinction made by that section between jail and non-jail defendants in the awarding of good time. While conceding that state prisons differed in purpose, usage and availability of facilities from county jails, the majority held that good time was granted primarily as an incentive for good behavior, that good time should be awarded to inmates in county jails in order to best fulfill the State's goal of inducing good conduct, and that the State could adequately fulfill any supervisory needs in awarding this good time through other methods. The dissent stated that it was not wholly arbitrary for the State to allow the Parole Board to have the power to act upon a prisoner's application for parole only

after he had spent a fixed proportion of his sentence in a place where his conduct had been under the observation of state prison officials.

The mandate of the District Court was stayed pending final determination by this Court.

The Statutory Plan

Section 230 of the Correction Law is part of a statutory plan of allowing prisoners to earn "good time" on their sentences while in state prison. Credit for jail time served while awaiting trial and disposition is credited to every prisoner who has been in the county jails. New York Penal Law, § 2193. This case concerns only the extra "good time" allowance which is given by statute only for the period that the prisoner is in state prison. Even in cases where time spent in jail before disposition was not credited to a prisoner's sentence, the courts have held that this result "is not sufficiently invidious to reach constitutional proportions". *Valcarcel* v. *United States,* 409 F. 2d 211, 213 (2d Cir. 1969); *Sobell* v. *Attorney General,* 400 F. 2d 986, 990 (3rd Cir. 1968), *cert. den.* 393 U.S. 940.

The system operated by having the Department of Correction calculate a series of release dates, which are given to each prisoner at the time he arrives at state prison. These dates are as follows:

1. "Minimum parole date"—a date calculated upon the greatest amount of good time that can be earned against the *minimum* sentence of an indeterminate term under § 230(2) and 230(3) which is the earliest date on which an inmate can be paroled at the discretion of the Parole Board.

2. "Statutory release date"—a date calculated upon the greatest amount of good time that can be earned against the *maximum* sentence of an indeterminate

term under § 230(4) which is the earliest date on which an inmate must be paroled by the Parole Board.

3. "Maximum expiration date"—the date of the maximum of a sentence to which an inmate can be held if he receives no good time credit at all.

The date at issue in this action is the "minimum parole date". A prisoner may receive a reduction of his sentence not to exceed 10 days for each month of his minimum term (§ 230[2]). In reality, however, an inmate does not "earn" this time as each month passes; instead, the greatest possible amount of his good time credit, calculated at one-third of the minimum sentence, is deducted from his sentence immediately upon arrival in prison, and the only changes in this allowance occur when penalties are inflicted (See § 235). [Thus, a prisoner with a minimum sentence of 3 years would be given a minimum parole date of 2 years, which theoretically could not be "earned" at the rate of 10 days a month or 4 months a year].

The problem in this case is that § 230(3) directs that this minimum parole date be calculated "less jail time allowance". The Department calculates the date at one-third off the time derived by first subtracting from the minimum sentence the amount of time spent in jail prior to coming to prison. [See computation for appellees, Appendix, pp. 18a, 21a] (Had appellees not spent time in jail prior to trial, their good time would be calculated at one-third off the minimum itself, which would result in a slightly greater amount of good time being subtracted). When this minimum date arrives, the Department of Parole then decides in its discretion whether the inmate should be paroled. No provision for any "good time" allowance for the period prior to confinement in state prison is authorized because by its very nature good time only applies to confinement after conviction.

Good time is awarded (or, in actuality, penalized) solely by the Department of Correction, which is the State agency responsible for the operation of the state prison system. New York Correction Law, § 235. The Department of Parole has no jurisdiction over any prisoner until the Department of Correction certifies that a prisoner is eligible for parole by "awarding" good time. However, whether or not the prisoner actually will be paroled is within the discretion of the Parole Board under the criteria set forth in § 213 of the Correction Law.

On September 1, 1967, § 230 of the Correction Law was replaced by §§ 803 and 805 of the Correction Law and §§ 70.30 and 70.40 of the new Penal Law, which apply to all convictions had after that date. Under the new statutory scheme, good time earned on the minimum sentence is abolished. A prisoner meets with the Parole Board at the expiration of his minimum term regardless of how much good time he has earned or of how much time he spent in jail prior to arriving at state prison [Correction Law, § 805(3), Penal Law, § 70.40(1)(a)]. At that meeting, the Parole Board determines in its discretion whether to release the prisoner on parole. Good time is now calculated off the maximum term of the sentence, regardless of jail time [Correction Law, §§ 803(1); 805(1); Penal Law, §§ 70.30(4); 70.40(1)(b)].

Persons imprisoned prior to September 1, 1967 have an opportunity, at any time, to elect to serve their sentence under the provisions of the new Penal Law and the new chapters of the Correction Law, and so be eligible for "conditional release" [Correction Law, § 230-a]. If they do not make this election, the old § 230(3) still applies. Both plaintiffs have not elected the new law procedures.

POINT I

By substituting its judgment for that of the New York Legislature, the decision of the three-judge District Court completely ignored the equal protection standards set forth by this Court and erroneously interpreted the role of the federal courts in reviewing state enactments.

In order to satisfy the equal protection clause of the Fourteenth Amendment, "[I]t is enough that the State's action be rationally based and free from invidious discrimination" *Dandridge* v. *Williams*, 397 U.S. 471, 486 (1969).* Legislatures are presumed to have acted constitutionally, and classifications will not be invalidated merely because the legislature moves one step at a time. *Schilb* v. *Kuebel*, 404 U.S. ——, 30 L.Ed. 2d 502, 510-511 (1971). As long as the classification is made on criteria not wholly unrelated to the objective of the statute, *Reed* v. *Reed*, 404 U.S. ——, 30 L.Ed. 2d 225, 229 (1971), or without any basis in practical experience, *South Carolina* v. *Katzenbach*, 383 U.S. 301, 331 (1968), the classification must be upheld. A statutory classification will be set aside only if no grounds can be conceived to justify it. *McDonald* v. *Board of Elections*, 394 U.S. 802, 809 (1969).

The court below applied these standards to § 230(3) of the New York Correction Law. It stated that "the real question, and indeed the only question, before the court is whether a rational basis exists for the distinction made by § 230(3) between jail and non-jail defendants in the awarding of good time credit" (Appendix, p. 58a). The Court

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*The equal protection test set forth in *Dandridge* v. *Williams* was employed by the Court below (Appendix, p. 58a) and is accepted by both parties on this appeal [See Appellees' Motion to Dismiss or Affirm, pp. 4-5]. The District Court did not decide whether the discrimination was invidious for any reason other than it lacked a rational basis (Appendix, p. 69a, fn. 14).

found that there was not a rational basis (Appendix, p. 58a). It is respectfully urged that the decision below is based upon an erroneous conception of the nature of the New York correctional system and is based upon a blatant misapplication of the equal protection standards enunciated by this Court.

A. The District Court incorrectly determined the reasons for the awarding of good time under the New York Correctional System.

It is undisputed in the record below that state prisons differ from county jails with respect to purpose, usage and availability of facilities. State prisons serve as essentially permanent residences for convicted prisoners as they serve out their sentences. They are intended to have rehabilitation as a prime purpose and the facilities at these institutions are built and equipped to serve this purpose.* To these ends, state prisons create and maintain long-term educational and vocational services such as schools, factories, job-training programs and related activities. See Affidavit of Deputy Commissioner John R. Cain, Appendix, p. 19a. State prisons come directly under the supervision of state correction authorities and it is these state authorities who must evaluate the prisoner's performance and conduct before making the difficult and sensitive decision of whether to allow him to be released into society before he completes the service of his sentence.

County jails, on the other hand, have an entirely different purpose when used for the pre-trial custody of ap-

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* New York law mandates that a prison education program be maintained at state prisons and that "each prisoner shall be given a program of education which, on the basis of available data, seems most likely to further the process of socialization and rehabilitation". New York Correction Law, § 136. The Correction Law further creates a full labor program for inmates at state prisons for both the purpose of production of supplies and for the purpose of "industrial training and instruction". Correction Law, §§ 171, et seq.

pellees. They serve solely as detention facilities. Correction Law, § 500-a(2). Persons in county jails awaiting trials or other disposition are not adjudicated prisoners, but are defendants clothed with the constitutional presumption of innocence. There would thus be no right or possibility of instituting a work program or engaging in any other program of rehabilitation for pre-trial detainees. The county jails are thus neither equipped nor intended to do anything more than detain people awaiting trial and maintain no schools, run no factories and require no work from these inmates.* County jails are supervised by local officials, and state officials have no jurisdiction whatever over inmates awaiting trial in these local jails.

These differences plainly allow for different treatment within a constitutional framework. The Constitution does not require that things different in fact be treated in law as though they are the same, and legislation may impose special burdens upon defined classes in order to achieve permissible ends. *Schilb* v. *Kuebel, supra,* 30 L.Ed. 2d 502, 513; *Rinaldi* v. *Yeager,* 384 U.S. 305, 308-309 (1966); *Tigner* v. *Texas,* 310 U.S. 141, 147 (1940).

The opinion of the court below totally misconstrued the ends sought to be achieved by New York's statutory scheme in awarding "good time". The court below ruled that the legislature's "primary aim" in the granting of good time reductions is "the maintenance of prison discipline" (Ap-

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* County jails may also be used for confinement of persons convicted of petty offenses and were used prior to 1968 for confinement of misdemeanants, Correction Law, § 500-a(4). These people were segregated from pre-trial detainees, Correction Law § 500-c. Where prisoners actually served their sentences in county jails after conviction, they were allowed to earn good time "for efficient and willing performance of duties assigned". Correction Law, § 250. In New York City, which supplies the bulk of New York's prison population, pre-trial detainees are housed in local houses of detention equipped solely to detain people awaiting trial. Convicted misdemeanants and violators are housed elsewhere.

pendix, p. 62a), and not for participation in any rehabilitation or work programs. The history of the New York Legislature's efforts to deal with the complex issue of awarding good time refutes this conclusion.

Prior New York law consistently made a distinction between "commutation" for good conduct and "compensation" for work performed. As far back as 1886, the Prison Law allowed only "a commutation or diminution" for "good conduct" [L. 1886, c. 21, §§ 1, 6, 7]. In 1889, the Legislature granted the award of *monetary* "compensation" for the "pecuniary value of work performed" in addition to commutation of sentence for good behavior [L. 1889, c. 382, § 108].

This statutory scheme specifically delineating between good behavior and work performed remained in effect for the next thirty years. With the introduction at the turn of the century of the indeterminate sentence, having both a minimum and a maximum term, the good time provisions for good conduct were amended to apply solely to definite sentences [L. 1903, c. 137, § 1]. In 1909, the good time provisions were codified into § 230 of the Prison Law [L. 1909, c. 47]. However, in 1916, the Prison Law underwent another major revision. It retained the "commutation" of time to be served for good behavior on definite sentences but it eliminated monetary compensation for work performed. In place of money, "compensation" of a reduction in sentence was awarded "for efficient and willing performance of duties assigned". This new compensation consisted of up to 10 days "in any such 30 day period in which the duties assigned are performed" and was to be awarded on both definite sentences and on the minimum terms of indeterminate sentences [L. 1916, c. 358]. Therefore, New York law was now making a clear distinction between time awarded for good behavior ("commutation" awarded on a sliding scale for only definite sentences) and additional time awarded for "performance of duties assigned" ("com-

pensation" awarded at a fixed rate on both definite and indeterminate sentences). See *People ex rel. Vanilla* v. *Denno*, 7 N.Y. 2d 29, 194 N.Y.S. 2d 486, 163 N.E. 2d 317 (1959)*.

In 1931, New York decided to consolidate these two different bases for the awarding of good time so that only one subtraction for good time would be made. Section 230(4) was amended to read that any person imprisoned after July 1, 1931 now could "earn for himself by good conduct *and* by efficient and willing performance of duties assigned" (emphasis added), a "compensation or diminution" of up to 5 days each month [L. 1931, c. 348]**. The statute thus retained the distinction of prior law between good conduct and work performed, but simplified the computation of time awarded. This language appears in § 230(2) of the Correction Law as it now affects appellees in the instant case. Good time thus is clearly not solely or even "primarily" an incentive for good behavior, as stated by the court below, but also equally applies to an evaluation of an inmate's work and training performance while in prison.

Since county jails have no educational, vocational or any other types of training or work programs or even work opportunities for pre-trial detainees, there is no way of equating the good time earned "for efficient and willing performance of duties assigned" in state prison with the mere confinement in county jails. The simple fact is that there are no duties assigned to prisoners who have not

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* Section 249 of the Prison Law was added in 1916 to define "compensation" as a reduction of sentence "on account of efficient and willing performance of duties assigned". Section 243 mandated that a paroled prisoner who commits a felony on parole and is returned cannot earn "commutation" for the remainder of his term, but was allowed to earn "compensation" on such remainder.

** Thus consolidation was first made for definite sentences in 1926 [L. 1926, c. 736] and applied to the minimum term of indeterminate sentences in 1931.

been convicted*. Inmates in institutions that serve different purposes and have different facilities can be treated differently. See *Urban* v. *Settle*, 298 F. 2d 592 (8th Cir. 1962); *Bush* v. *Ciccone*, 325 F. Supp. 699 (W.D. Mo. 1971) (upholding statutory denial of good time under 18 U.S.C. § 4241 for prisoners transferred to the Federal Medical Center).

In spite of these differences, the court below attempted to point to other provisions of the Correction Law to show that good time was "primarily" a reward for good behavior. It cited section 235 to show that good time may be withheld as punishment for offenses "against the discipline" of the prison (Appendix, p. 60a). This does not have any special meaning. Clearly, failure to efficiently and willingly perform duties assigned would be offenses against the discipline of the prison. Indeed, § 230(3) specifically mandates loss of good time for "bad conduct, violation of prison rules *or failure to perform properly duties assigned*" (emphasis added).

Nor does the fact that the state grants good time for pre-sentence jail time on the *maximum* terms of an indeterminate sentence lead to the conclusion that good time is primarily a good conduct reward.** A decision to release a prisoner prior to the expiration of his minimum

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* Federal law also makes this distinction between good conduct and work performed. 18 U.S.C. § 4161 allows prisoners to earn good time if they have "faithfully observed all of the rules". 18 U.S.C. § 4162 allows additional good time for "actual employment" and "performing duties of outstanding importance". By recent federal policy, good time under § 4161 is deducted from jail time; good time under § 4162 is not so deducted. See *Cohen* v. *Ciccone*, 318 F. Supp. 831 (W.D. Mo. 1970).

** Good time on the maximum term of an indeterminate sentence was instituted in 1962 as a new § 230(4) [L. 1962, c. 826]. It awarded two days per month "for good conduct and efficient and willing performance of duties assigned" and an additional three days per month for achievement in a treatment program. The statute specifically excluded credit for "time served in confinement in

(*footnote continued on following page*)

sentence, as opposed to the maximum sentence, requires a much greater need for personal supervision and evaluation of the inmate by state officials in a full state correctional program. The decision means that the Parole Board will be allowed to release a prisoner into society in the face of a sentence by a state court judge who determined, in evaluating the prisoner's prior record and the magnitude of his crime, that this minimum sentence was the *least* amount of time the prisoner should participate in the state prison program. While the prisoner is in a county jail, the state has no means of evaluating his conduct or performance in order to make the sensitive decision of release before even the minimum of his sentence is served. Indeed, even if the state were to take over all of the county jails, there would be no way of evaluating the conduct, performance and potentiality for rehabilitation and release of an inmate in a county jail who participates in no programs whatever. It is clearly a valid governmental aim for the state to decide that individuals shall be evaluated for the same amount of time under a full work and training program before they are released into society prior to the lowest possible date set

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(*footnote continued from previous page*)

an institution other than a state prison or penitentiary". In 1966, this latter provision was eliminated and the first sentence amended to apply only to a prisoner "confined in an institution under the jurisdiction of the state department of correction". Therefore, good time on the maximum was not awarded for pre-trial incarceration in county jails. However, in 1968, a New York lower court ordered that good time on the maximum be awarded for jail time because §230(4) does not specifically exclude jail time as did §230(3). *People ex rel. Stark* v. *Deegan*, 56 Misc. 2d 567, 289 N.Y.S. 2d 285 (Sup. Ct., Westchester Co., 1968). The Department of Correction then decided in its discretion as a matter of policy that it would award such good time for jail time on the maximum sentence. The New York courts have upheld the denial of good time for jail time on the minimum sentence. *Matter of Peres* v. *Follette*, 58 Misc. 2d 319, 295 N.Y.S. 2d 231 (Sup. Ct., Dutchess Co., 1968), *aff'd* 31 A.D. 2d 600, 295 N.Y.S. 2d 608 (2d Dept.), *mot. for leave to appeal dismissed as moot*, 23 N.Y. 2d 737, 296 N.Y.S. 2d 569 (1968).

by the sentencing court. See *Pagliaro* v. *Cox*, 143 F. 2d 900, 901 (8th Cir. 1944).

However, these considerations are minimized in considering release prior to the *maximum* date of an indeterminate sentence. The prisoner has already served a term past the minimum and so has fulfilled the mandate of the evaluation of the sentencing judge. The prisoner has also participated longer in the state correctional program, and the Correction Department, in its awareness that good time credit is an effective disciplinary device, determined that its evaluation in a full prison program was less important than it would be for release prior to the minimum term.*

The striking flaw in the District Court's opinion is that even if good time was "primarily" a good behavior device, the awarding of good time would still require the evaluation and supervision of state prison personnel in a state prison. Good behavior is not an abstraction that can be applied with exact equivalence to totally different fact situations, and the state can rationally decide to accord different values to behavior in institutions that have totally different programs. Good behavior while participating in a full state work and rehabilitation program clearly requires different evaluation than good behavior while sitting idle in a jail cell.

In fact, until recently changed by federal policy, the federal prison system itself did not require the awarding of good time for pre-trial incarceration under 18 U.S.C. § 4161, which awards good time solely for good behavior. Section 4161 states that good time begins to run "with the

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* Section 230(3) allows good time credit for jail time on sentences of under one year in penitentiaries. Where the sentence is so short, and the crime proportionately less serious than that of a felony, the Legislature determined that the sensitive evaluation of the Correction Department was not that essential insofar as computing release for good time earned.

day on which the sentence commences to run", and the sentence does not start to run until the prisoner is received in a federal penitentiary. See *Blackshear* v. *United States*, 434 F. 2d 58 (5th Cir. 1970). The federal courts have uniformly upheld the denial of the opportunity to earn good time on this jail time. *Bandy* v. *Willingham*, 398 F. 2d 333 (10th Cir. 1968), *cert. den.* 393 U.S. 1006; *Aderhold* v. *Ellis*, 84 F. 2d 543 (5th Cir. 1936), *cert. den.* 299 U.S. 587; *Swope* v. *Lawton*, 83 F. 2d 814 (9th Cir. 1936).

This Court cannot discount the importance of state evaluation in a full prison program in the face of affidavits stating that this is an essential part of the good time award (Appendix, p. 19a). Indeed, the need for state supervision of its own programs has been cited in other states as the basis for the denial of good time credit for time spent outside of that supervision. *Gentry* v. *Texas*, 464 S.W. 2d 848, 850 (Ct. of Crim. Appeals of Texas, 1971); *Lipschitz* v. *New Jersey*, 43 N.J. Super. 522, 129 A. 2d 310 (App. Div. 1957); *Application of Leibowitz*, 43 N.J. Super. 579, 129 A. 2d 466 (App. Div. 1957).*

The importance of supervision in a full correctional program is highlighted by the judicial treatment of the election procedure of the former Rule 38(a)(2) of the Federal Rules of Criminal Procedure. Prior to its amendment in 1966, a defendant wishing to appeal his conviction could elect not to serve his sentence pending appeal in order to remain in the place where he was tried. However, while he was still imprisoned in the local federal facility, he re-

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* In denying good time credit for time spent in the county jail prior to trial, the New Jersey court in *Lipschitz, supra,* stated (129 A. 2d at 312-313):

> "The granting or withholding of commutation credits requires the exercise of judgment by the officials specifically designated in [the statute], based upon their observation and evaluation of the prisoner's conduct. They can only exercise such judgment when the prisoner is in their custody at the State Prison".

ceived no credit on his sentence. The federal courts have consistently upheld the denial of this jail time—even where the defendant was given the maximum sentence—because a sentence did not begin to be served until a defendant was under federal supervision in a federal prison program. *Duke* v. *Blackwell*, 429 F. 2d 531 (5th Cir. 1970); *Tandler* v. *Blackwell*, 412 F. 2d 781 (5th Cir. 1969); *Valcarcel* v. *United States*, *supra*; *Sobell* v. *Attorney General*, *supra*; *United States* v. *Pruitt*, 397 F. 2d 509 (7th Cir. 1968). There can hardly be any constitutional deprivation for the denial of good time for time spent in a local detention facility where the courts have consistently found no constitutional deprivation for the denial of the very jail time itself.

B. The District Court misapplied the equal protection standards as interpreted by prior Supreme Court decisions and substituted its own views for valid enactments of the state legislature.

The majority of the District Court did not challenge any of the differences between state prisons and county jails (Appendix, p. 59a). It did not reject the uncontested allegations of appellants as to the need for state supervision and evaluation in a state program before good time could be awarded (Affidavit of John R. Cain, Appendix, p. 19a). What the majority held was that the need for inmate participation in and state supervision of the educational, training and rehabilitative programs of a state facility was not the "primary" reason for the awarding of good time and therefore saw no rational basis in making a distinction between good behavior in state prisons and good behavior in county jails (Appendix, pp. 59a-60a, 61a-62a). This conclusion is based upon a totally erroneous equal protection standard.

Even assuming *arguendo* that the "primary" reason for the awarding of good time is to encourage good behavior

the lower court must be reversed, for the majority below has created an equal protection standard that has no basis in any of the decisions of this Court. In applying the rational basis standard, it has stated in effect that a statutory distinction will be upheld only if it is supported by what a court may consider to be the "primary reason" for the making of the distinction. This is squarely in contradiction to the uniform rulings of this Court that a distinction made by a state statute must be upheld "if *any* state of fact *can conceivably* justify it". (Emphasis added.) *Dandridge* v. *Williams, supra,* 397 U.S. at 485; *McDonald* v. *Board of Elections, supra,* 394 U.S. at 809; *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961).

It is true that an inmate who serves time in a county jail prior to conviction may meet the Parole Board a few months later than an inmate serving the same sentence who was not incarcerated prior to trial. However, the fact that a statute might disadvantage a particular class does not mean that it denies equal protection. *James* v. *Valtierra,* 402 U.S. 137, 142 (1971). This case does not deal with distinctions made as to any fundamental constitutional rights. The federal courts have uniformly held that the granting or denial of good time in state prisons does not raise any federal constitutional question or bring into issue any federally protected rights. *Hanvey* v. *Pinto,* 441 F. 2d 115 (3rd Cir. 1971); *Douglas* v. *Sigler,* 386 F. 2d 684, 686 (8th Cir. 1967); *Quirke* v. *Beto,* 373 F. 2d 739 (5th Cir. 1967); *Burns* v. *Crouse,* 339 F. 2d 883 (10th Cir. 1964); *Aderhold* v. *Ellis, supra.*

Appellants presented a clear valid reason for the distinction made in § 230(3)—that since it is the state correction authorities who must ultimately make the sensitive decision of whether to allow a prisoner to be released prior to the expiration of his minimum sentence, the granting of good time leading to an earlier minimum release should be based solely on a personal evaluation of a

prisoner's conduct by state officials in a state prison program. It is totally irrelevant whether or not this is the "primary" reason for the statute. The distinction made is clearly related to the objective of the statute of encouraging good behavior consistent with protecting society. Neither the majority nor the appellees contested this reason and the application of the rational basis standard must end at this point.

However, the District Court did not follow the explicit holdings of this Court in equal protection cases. Instead, the majority decided that the encouragement of good behavior was such a compelling reason for the awarding of good time that good behavior should also be rewarded among pre-trial detainees regardless of the differences in place of confinement (Appendix, pp. 61a-62a). The Court then set forth alternative ways of how state officials might be able to fulfill their goal of supervision while fulfilling the District Court's goal of rewarding good behavior for time spent in county jails awaiting trial (Appendix, p. 62a). In effect, the District Court ruled that the New York Legislature did not create the most effective good time program consistent with what the District Court believed were the goals of the Legislature, and therefore decided that the federal courts should mandate a program which "would serve *the greater goal* of inducing good behavior by the prisoners throughout the total period of their confinement" (Emphasis added; Appendix, p. 62a). This is a blatant imposition of the District Court's own philosophy of penology and is the very judicial activity forbidden by this Court.

This Court has consistently held that a federal court cannot strike down a state statute because it has a different view as to what would be a wiser statutory scheme. *Dandridge* v. *Williams, supra,* 397 U.S. at 485-488; *Norvell* v. *Illinois,* 373 U.S. 420, 424 (1963). As the Court most

recently stated in *Labine* v. *Vincent*, 401 U.S. 532, 537 (1971):

> "The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules."

The fact that the District Court believed that the encouragement of good behavior in county jails should be a state goal does not mean that it must be a state goal by constitutional mandate. There is no constitutional right to good time (See cases at p. 23, *supra*) and the difference in facilities and usage of state prisons and county jails allow for the making of valid distinctions in awarding good time. The District Court's belief that good time could be awarded in county jails "without imposing great expense or administrative burden on the state" (Appendix, p. 62a), besides being incorrect,* is totally irrelevant to any decision based on constitutional grounds. New York has decided that the awarding of good time on the minimum sentence requires state supervision in a state program, and a federal court is not free to reject this rationale because it believes it can run the state prison system in a better manner consistent with the personal penal philosophies of the respective federal judges. See

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* The ruling of the District Court is calculated to impose on the State the unprecedented burden of taking over the supervision of every local jail in the State. The problem of determining what branch of government could best administer detention facilities has recently been given deep consideration by the Advisory Commission on Intergovernmental Relations, a national commission established by Act of Congress [Public Law 380] and the Commission recommended that jails and detention facilities continue to be administered by localities, and not by the state. *State-Local Relations in the Criminal Justice System*, Advisory Commission on Intergovernmental Relations, Washington, D.C., August 1971, pp. 55-56.

Sostre v. *McGinnis*, 442 F. 2d 178, 191 (2d Cir. 1971), cert. *den.* 404 U.S. —— (1972). As this Court stated in *Lalor* v. *Vincent, supra* (401 U.S. at 538-39):

> "It may be possible that some of these choices are more 'rational' than the choices [made by the State Legislature] . . . Absent a specific constitutional guarantee, it is for that legislature not the life-tenured judges of this Court to select from among possible laws."

Indeed, much of the reasoning of the majority below attacking the rationality of § 230(3) is based upon the majority's conception that the supervisory aspect of good time is minimal because the Parole Board would still have the discretion to refuse to release any prisoner who had earned sufficient good time on his minimum sentence (Appendix, p. 63a). The court below fails to recognize that the Legislature did not intend that the Parole Board be *allowed* to exercise its discretion until after a prescribed minimum amount of state supervision and state confinement had elapsed. The majority cannot substitute its own judgment for that of a state legislature as to the criteria by which a state agency should operate.

The application of this remarkable "primary basis" standard must of necessity lead the courts to examine the motivation of state legislatures in passing statutes. This is a virtually impossible task, and such examination by the courts has been condemned by this Court. *Palmer* v. *Thompson*, 403 U.S. 217, 224-25 (1971). In the instant case, the majority below refused to consider the supervisory aspects of good time because the awarding of good time was not based "solely and exclusively" on the evaluation of a prisoner's performance in a state prison program (Appendix, p. 59a). Presumably, the New York legislature could repass the same § 230(3) for the reasons suggested by the Court, and the District Court would then

have to uphold it. The application of the equal protection standard as announced below would require the federal courts to sit as super-legislatures for the states, and would lead to the very type of prohibited judicial legislation as occurred in the instant case.

The need for state supervision in a state program thus presents a clear valid rational basis for the distinctions made in § 230(3) between awarding good time in state prison and county jails. The District Court's finding to the contrary represents an impermissible imposition of its own penal philosophy on the state. As the dissent below correctly indicates, the decision of the District Court is based solely "on the judges' convictions that they can administer state prisoners more wisely than the state authorities, and not on any compelling constitutional considerations" (Appendix, p. 70a).

POINT II

The Court below should have treated this case as a proceeding for habeas corpus and should have required the appellees to have exhausted their state remedies.

This Court has only recently reaffirmed a determination to enforce the congressional policy that persons seeking relief from the restraint of state court judgments first proceed to exhaust available state remedies before seeking relief in the federal courts, 28 U.S.C. § 2254; *Picard* v. *Connor*, 404 U.S. ——, 30 L. Ed. 2d 438 (1971); *Wilwording* v. *Swenson*, 404 U.S. ——, 30 L. Ed. 2d 418, 421 (1971). A number of lower courts have ruled that this requirement may not be evaded by disguising an application for habeas corpus as a civil rights action. See e.g. *Grayson* v. *Montgomery*, 421 F. 2d 1306 (1st Cir. 1970); *Smartt* v. *Avery*, 411 F. 2d 406 (6th Cir. 1969); *Bennett*

v. *Allen*, 396 F. 2d 788 (9th Cir. 1968); *Johnson* v. *Walker*, 317 F. 2d 418 (5th Cir. 1963); *Duncombe* v. *State of New York*, 267 F. Supp. 103 (S.D.N.Y. 1967); *Lombardi* v. *Peace*, 259 F. Supp. 222 (S.D.N.Y. 1966). We submit that this is a correct statement of the law and applies in the instant case.

The sole object of the instant action was to gain appellees' release from the custody of the State Department of Correctional Services. The fact that the Parole Board may still have had to exercise its discretion to release appellees does not change the object of the proceeding. The historic function of the habeas corpus petition is to afford relief from confinement unlawfully imposed, and there is no reason for denying their natural meaning to the words of 28 U.S.C. § 2254, that a writ of habeas corpus may be entertained by a federal court "in behalf of a person in custody pursuant to the judgment of a State court . . . on the ground that he is in custody in violation of the Constitution . . ." See *Smith* v. *Follette*, 445 F. 2d 955, 962 (2d Cir. 1971) (Concurring opinion of KAUFMAN, J.). In substance, this action was a proceeding for habeas corpus, and, despite the presence of a constitutional issue, should have been heard and determined by a single-judge district court, *Jackson* v. *Denno*, 378 U.S. 368, 370 (1964) provided the necessary pre-requisite of exhaustion of state remedies had been satisfied. 28 U.S.C. § 2254; *Picard* v. *Connor*, *supra*, *Wilwording* v. *Swenson*, *supra*. It was thus erroneous for the District Court to have held exhaustion to be unnecessary (Appendix, p. 57a).

CONCLUSION

For all the foregoing reasons, the decision below should be reversed.

Dated: New York, New York, April 26, 1972.

Respectfully submitted,

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